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Walgreen Company*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

<p>EDIZONE, LLC,  Plaintiff,  vs.  MERCK &amp; CO., INC., SCHERING-PLOUGH HEALTHCARE PRODUCTS, INC.,  BROWN SHOE COMPANY, INC.,  WAL-MART STORES, INC.,  TARGET CORPORATION,  WALGREEN CO., and  DOES 1 – 50,  Defendants</p>	<p><b>DEFENDANT WALGREEN'S ANSWER AND DEFENSES</b>  Case No.: 2:10-cv-00855-TS  Judge Ted Stewart</p>
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Defendant Walgreen Co. ("Walgreen") hereby answers and otherwise responds to the Complaint of Plaintiff EdiZONE, LLC ("EdiZONE") as follows:

### **PARTIES AND JURISDICTION**

1. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.
2. Walgreens responds to the allegations in Paragraph 2 of the Complaint as follows:
  - (a) Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2(a) of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.
  - (b) Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2(b) of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.
  - (c) Walgreen admits that it is an Illinois corporation with a principal place of business outside of the state of Utah and has established retail stores throughout the United States, including within the state of Utah. Walgreen also admits that it sells Dr. Scholl's insole, heel cushion, and heel cup products in its retail stores. Otherwise, Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2(c) of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.
  - (d) Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2(d) of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

3. Walgreen admits that it sells and distributes products in the state of Utah, and Walgreen does not contest that this Court has personal jurisdiction over Walgreen for the purpose of this action only. Otherwise, Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

4. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

5. Walgreen admits that this Court has subject matter jurisdiction over the patent infringement claims, and Walgreen admits that this Court is a proper venue with respect to Walgreen for the purposes of this action only. Otherwise, Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

### **GENERAL ALLEGATIONS**

6. Walgreen responds that the document attached as Exhibit 1 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

7. Walgreen responds that the document attached as Exhibit 1 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

8. Walgreen responds that the document attached as Exhibit 1 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

9. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

10. Walgreen responds that the document attached as Exhibit 1 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

11. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

12. Walgreen responds that the document attached as Exhibit 1 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 12 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

13. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

14. Walgreen is without knowledge or information sufficient to form a belief as to the

truth of the allegations contained in Paragraph 14 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

15. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

16. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

17. Walgreen responds that the document attached as Exhibit 2 to the Complaint speaks for itself and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

18. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

19. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

20. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

21. Walgreen is without knowledge or information sufficient to form a belief as to the

truth of the allegations contained in Paragraph 21 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

22. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 22 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

23. Walgreen responds that the document attached as Exhibit 3 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

24. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

25. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

26. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

27. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 27 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

28. Walgreen is without knowledge or information sufficient to form a belief as to the

truth of the allegations contained in Paragraph 28 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

29. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

30. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

**FIRST CLAIM FOR RELIEF**  
**(Breach of License Agreement**  
**Against DR. SCHOLL'S for Failure to Mark and Timely Cure)**

31. Walgreen incorporates by reference its response to all other allegations of the Complaint as if fully restated herein.

32. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

33. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 33 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

34. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 34 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

35. Walgreen is without knowledge or information sufficient to form a belief as to the

truth of the allegations contained in Paragraph 35 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

36. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 36 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

37. Walgreen admits that there is a Walgreens store in Lehi, Utah, and that this store, like many other Walgreens stores, carried Dr. Scholl's products, including Massaging Gel Sport Insoles, Massaging Gel Heel Cushion, and Massaging Gel Ball of Foot Cushions. Otherwise, Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 37 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

38. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 38 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

39. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 39 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

40. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 40 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

**SECOND CLAIM FOR RELIEF**  
**(Breach of License Agreement**  
**Against DR. SCHOLL'S for**  
**Exceeding Field of Use with Whole Shoes)**

41. Walgreen incorporates by reference its response to all other allegations of the Complaint as if fully restated herein.

42. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 42 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

43. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 43 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

44. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 44 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

45. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 45 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

**THIRD CLAIM FOR RELIEF**  
**(Patent Infringement**  
**Against DR. SCHOLL'S and BROWN SHOE for**  
**Use of Massaging Gel in Whole Shoes)**

46. Walgreen incorporates by reference its response to all other allegations of the Complaint as if fully restated herein.

47. Walgreen is without knowledge or information sufficient to form a belief as to the

truth of the allegations incorporated by Paragraph 47 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

48. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations incorporated by Paragraph 48 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

49. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations incorporated by Paragraph 49 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

50. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations incorporated by Paragraph 50 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

51. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations incorporated by Paragraph 51 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

52. Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations incorporated by Paragraph 52 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

**FOURTH CLAIM FOR RELIEF**  
**(Patent Infringement**  
**Against DR. SCHOLL'S and RETAILERS for**  
**Supplying and Selling Massaging Gel without a License)**

53. Walgreen incorporates by reference its response to all other allegations of the Complaint as if fully restated herein.

54. Insofar as Paragraph 54 pertains to Walgreen, denied. Otherwise, Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 54 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

55. Insofar as Paragraph 55 pertains to Walgreen, denied. The allegations of this Paragraph 55 are contradicted by the allegations of the First Claim for Relief. Otherwise, Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 55 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

56. Insofar as Paragraph 56 pertains to Walgreen, denied. Otherwise, Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 56 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

57. Insofar as Paragraph 57 pertains to Walgreen, denied. Otherwise, Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 57 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

58. Insofar as Paragraph 58 pertains to Walgreen, denied. Otherwise, Walgreen is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 58 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

59. Insofar as Paragraph 59 pertains to Walgreen, denied. Otherwise, Walgreen is

without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 59 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

**AFFIRMATIVE AND OTHER DEFENSES**

Walgreen offers the following defenses to EdiZONE's Fourth Claim, the only claim in which Walgreen is named, and reserves the right to introduce any of the following defenses, or any other defenses that arise, as counterclaims at a later time.

**First Defense:  
Patent Invalidity**

1. The claims of the '759 patent are invalid for failing to meet the requirements of one or more of the provisions of 35 U.S.C. §§102, 103, and 112.

**Second Defense:  
Noninfringement**

2. Walgreen has not infringed and is not liable for any infringement of any valid claim of the '759 patent.

**Third Defense:  
Laches, Waiver, and Estoppel**

3. Plaintiff's claims are barred in whole or in part by the doctrines of waiver, laches, estoppel, abandonment, and unclean hands.

**Fourth Defense**

4. Plaintiff's Complaint fails to state a claim against Defendant upon which the relief sought, or any relief, can be granted.

**Fifth Defense**

5. Plaintiff's claims, or some of them, are barred or limited by contract.

**Sixth Defense**

6. Plaintiff's claims, or some of them, are barred, in whole or in part, by Plaintiff's own material breaches of contract.

**Seventh Defense**

7. Plaintiff's claims, or some of them, are barred by the doctrines of mistake, accord and satisfaction.

**Eighth Defense**

8. Plaintiff's claims, or some of them, are barred by Plaintiff's failure to mitigate their damages, if any.

**Ninth Defense**

9. Plaintiff's claims, or some of them, are barred by the economic loss doctrine.

**Tenth Defense**

10. Plaintiff's requests for relief, or some of them, are barred because Plaintiff has an adequate remedy at law.

**Eleventh Defense**

11. Plaintiff's damages, if any, were the result of events, factors, occurrences or conditions which were in no way caused by Defendant and for which Defendant may not be held liable.

**Twelfth Defense**

12. Plaintiff's claim for punitive damages against Defendant is barred because of the Plaintiff's failure to plead the necessary elements against Defendant to sustain an award of punitive damages and, in particular, the claim fails to meet the requirements of Utah Code §78B-8-201.

**Thirteenth Defense**

13. Defendant reserves the right to amend, modify, or supplement these defenses as may be necessary based on discovery in this matter.

**PRAYER FOR RELIEF**

Walgreen denies that Plaintiff is entitled to any relief sought against Walgreen in the Complaint.

WHEREFORE, Walgreen demands that Plaintiff's claims be dismissed, with prejudice and that it be awarded nothing thereby, that Walgreen be awarded its costs and attorneys' fees incurred herein, and that the Court order such other and further relief as may be necessary and appropriate in the circumstances.

November 22, 2010

Respectfully submitted.

/s/ Elisabeth M. McOmber

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Daniel A. Boehnen, Of Counsel (*motion for Pro Hac Vice admission to be submitted*)

Jessica L. Lunney, Of Counsel (*motion for Pro Hac Vice admission to be submitted*)

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*Attorneys for Defendant Walgreen Co.*



**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of November, 2010, I electronically filed the foregoing **DEFENDANT WALGREEN'S ANSWER AND DEFENSES** through the CM/ECF System, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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/s/ Elisabeth M. McOmber

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